IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 3366 Of 2002

IN

SUIT NO. 118 Of 1998

Yasmin Y.Hashim Gulab Syed & ors .. Plaintiffs

versus

Nazneen Naeem Sha & ors. .. Defendants

...

Mr.Sanjiv Sawant for the plaintiff.

Ms.N.J. Asrani for the defendant.

CORAM : D.G. KARNIK,J.

DATED : 10th February 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. This motion is taken out by the plaintiffs alleging that the plaintiff is the owner of the suit flat (flat no.43, "B" Bldg, Shatdal Co-op Housing

Society Ltd. Azad Road, Andheri(W), Bombay 400 058) The plaintiffs have claimed a declaration that any agreement, documents under which the defendants claim to have purchased and/or acquired the rights in the suit flat should be declared to be null and void and defendants be declared to be trespassers and the mandatory injunction to be issued directing them to vacate the suit flat or a room in the flat which is in their possession.

3. The defendant no.1 has controverted the averments and has claimed that the defendant no.1 has purchased the suit flat under the agreement of sale dated 20th March 1989, copy of which is annexed to the further affidavit dated 3rd February 2005. The defendant no.1 therefore, claims to be the owner of the flat.

4. By this motion, the plaintiffs pray for an injunction restraining the defendants from transferring or alienating the suit flat during the pendency of the suit. They also pray for an injunction directing the defendants to pay a sum of Rs.3,500/- per month as compensation.

5. Prima facie, the defendant no.1 has entered into an agreement of purchase and has been in possession of the flat in pursuance of the agreement of sale. The original owner has also transferred the share certificates to which the right to occupy the said flat is attached, to the defendant no.1. As the society initially declined to recognise the transfer of the suit flat,perhaps due to the objection of the plaintiffs, the defendant no.1 filed an appeal u/s.23 of the Maharashtra Co-operative Societies Act which was allowed by the Dy. Registrar who directed the Society to admit the defendant no.1 as a member and transfer the shares in her name. That order is dated 27th November 1990. The present suit has been filed after 8 years of the said order and transfer of the shares in the name of defendant no.1.

6. Under section 6 of the Transfer of Property Act, property of every kind is transferable. The occupancy rights in the flat which are claimed by the defendant no.1 are also transferable as held by the Supreme Court in the case of Ramesh Himmatlal Shah Versus Harsukh Jadhavji Joshi reported in AIR 1975 SC 1470. In the circumstances, the defendant no.1 cannot be prevented from transferring the suit flat.

Appropriate remedy for the plaintiffs is to register a notice of lis pendence u/s.52 of the Transfer of Property Act by which they would be sufficiently protected.

7. No order for payment of any money to the plaintiffs can be passed at this stage as prima facie the defendant no.1 has purchased the suit flat and the plaintiffs have not proved their title. Furthermore, the plaintiffs would be entitled to apply for determination of the mesne profits under Order 20 Rule 12 of the Code of Civil Procedure in the event they ultimately succeed.

8. For these reasons motion is dismissed. At the request of the learned counsel for the plaintiff, operation of this order is stayed for a period of four weeks.

D.G. KARNIK, J